

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MASSACHUSETTS  
3

4 KPM Analytics North America )  
Corporation, )  
5 Plaintiff, )

6 vs. ) Civil Action No. 21cv10572-MRG  
7 )

8 Blue Sun Scientific, LLC, )  
The Innovative Technologies )  
9 Group & Co., Ltd., Arnold )  
Eilert, Michelle Gajewski, )  
10 Robert Gajewski, Rachael )  
Glenister, Gregory Israelson, )  
11 Irvin Lucas, and Philip )  
Ossowski, )  
12 Defendants. )

13  
14 BEFORE: The Honorable Margaret R. Guzman  
15

16 Trial Day 9  
17

18 United States District Court  
19 Courtroom No. 2  
595 Main Street  
20 Worcester, Massachusetts  
May 15, 2023  
21

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## INDEX

WITNESSPAGE

Neil Zoltowski

Continued Direct Examination

7

By Mr. Gutkoski

Cross-Examination

25

By Mr. Ritchie

Cross-Examination

55

By Mr. Wilson

Redirect Examination

58

By Mr. Gutkoski

Recross-Examination

67

By Mr. Ritchie

Further Redirect Examination

69

By Mr. Gutkoski

Irvin Lucas

Direct Examination

80

By Mr. Ritchie

Cross-Examination

84

By Mr. Gutkoski

G. William Kennedy

Direct Examination

85

By Mr. Ritchie

Cross-Examination

100

BY MR. GUTKOSKI

REDIRECT EXAMINATION

107

BY Mr. Ritchie

## E X H I B I T S

Exhibit No.DescriptionReceived

None.

P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Margaret R. Guzman, United States District Judge, United States District Court, District of Massachusetts, at the Donohue Federal Building & United States Courthouse, 595 Main Street, Worcester, Massachusetts, on May 15, 2023.)

THE CLERK: All rise.

Court is now open. You may be seated.

THE COURT: Thank you. We're going to be bringing the jurors out in just a minute. I just wanted to let you all know over the weekend we have been working through both -- all that we had from both parties regarding instructions and verdict slips.

What we have created is a starting point for discussion. Attorney Foley is creating copies for everyone now. We'll provide it to your desk. They'll have someone give them to you in the back. And then when we have a break, you can start looking at it. And even if we -- oh, good -- and even if we don't finish today, you'll have it so that we can start talking, having whatever discussions we're going to have about contrary positions on it. All right. And that will give you some idea.

I have created the jury -- the verdict slips. I'll hear you on argument. And then you can take a look at them,

1 but I anticipate that we'll have a vigorous and spirited and  
2 respectful discussion about the verdict slips. Okay?

3 All right. Are we ready?

4 MR. GUTKOSKI: Just in terms of timing today, are we  
5 expecting just to go to 1:00 if we finish the evidence by then?

6 THE COURT: Yes, we've already told the jurors. Now  
7 if we are short by an hour or so, I would like to finish the  
8 testimony today, and we can probably ask the jurors just to  
9 stay until we finish the testimony. And then you can do  
10 arguments, and we can do the charge in the morning. So really  
11 do make an estimate. If it's close, I'm sure the jurors will  
12 accommodate us.

13 MR. GUTKOSKI: I -- I -- I am hopeful, if anything,  
14 we'll run short and not long of one o'clock.

15 THE COURT: Okay.

16 MR. RITCHIE: Your Honor, the other thing is, I  
17 think -- I believe some of the defendants will be making a  
18 motion for judgment at the end of plaintiff's case. I  
19 obviously don't want to do that in front of the jury.

20 THE COURT: Well, We can always -- you know, we can  
21 always give them a break, and we have plenty of time. I think  
22 that's good. We will do that as soon as -- as soon as the  
23 testimony is done. We'll -- we'll -- I think the jurors would  
24 be really flexible with us if they knew by being here until  
25 2:30 they would be able to finish the evidence. So -- but we

1 won't inform them until we get to that point that that's where  
2 we are at. It would be nice to start fresh with arguments and  
3 charge. That would be a really nice thing to do, but, you know,  
4 we're flexible.

5 And I appreciate all your efforts and thoughts, and  
6 we will work in whatever breaks we have.

7 And, Attorney Foley, you have made copies for  
8 the parties?

9 MR. FOLEY: I'll have copies in just a moment, Judge.

10 THE COURT: All right. What we'll do is we'll provide  
11 them to the -- at the break, we can give it to you at the  
12 break or -- you wouldn't be able to be looking at them in the  
13 middle of testimony anyways so.

14 Okay. Let's bring the jury in.

15 (At 9:07 a.m., the jury entered the courtroom.)

16 THE CLERK: Court is now open. You may be seated.

17 THE COURT: All right. Good morning, ladies and  
18 gentlemen. Let me just ask you -- I'm going to assume you all  
19 had an nice weekend. So I don't have to ask you about it, were  
20 you able to abide by all my rules, no internet search and no  
21 investigation?

22 (No response.)

23 THE COURT: Thank you very much.

24 We're going to get right back into the case. Can the  
25 plaintiff call their witness back up.



1 MR. GUTKOSKI: We can. Good morning, ladies and  
2 gentlemen. The plaintiff recalls Neil Zoltowski to the stand.

3 THE COURT: All right. Good morning, Mr. Zoltowski.

4 THE WITNESS: Good morning.

5 THE COURT: I'm going to remind you you're still under  
6 oath, sir. Please have a seat.

7 And, counsel, you may inquire.

8 MR. GUTKOSKI: Thank you.

9 DIRECT EXAMINATION

10 BY MR. GUTKOSKI:

11 Q. Good morning, Mr. Zoltowski.

12 A. Good morning.

13 Q. I'm going to put back up on the screen where we were  
14 in your presentation, your demonstratives, which I believe  
15 was slide 7.

16 And, if you recall, we were talking about your calculation  
17 of unjust enrichment damages.

18 Do you recall that testimony?

19 A. I do.

20 Q. And I believe you testified that this is the measure  
21 of trade secret damages under both the federal and state  
22 allegations for trade secret misappropriation, correct?

23 A. That's correct.

24 Q. And that this was one of two different ways of  
25 measuring damages, correct?

1 A. Correct.

2 Q. And that this measured the damages received by the  
3 defendants, the amount that they were unjustly enriched  
4 assuming liability under those counts; is that fair to say?

5 A. That's fair.

6 Q. Okay. And I think where we left off was that you had  
7 allocated the \$2,071,974 number for profits received unjustly  
8 by Blue Sun?

9 A. Correct.

10 Q. And then an addition \$1,143,127 of additional profits  
11 unjustly received by ITG?

12 A. That's correct.

13 Q. Okay. For the total of 3.2 -- \$3,215,101?

14 A. Correct.

15 Q. All right. Now, having brought us back to where we left  
16 off. Regarding the additional individual defendants, were you  
17 able to or did you undertake to allocate unjust enrichment  
18 damages amongst the individual defendants?

19 A. I did. I was asked to do so.

20 Q. And how did you do that?

21 A. It was different depending on the individual, but I can go  
22 through them one by one. For Mr. Lucas, given that he was the  
23 one who originally came up with the idea of Blue Sun and  
24 approached Mr. Wilt was really the architect of the business.  
25 He recruited all of the individuals from KPM to join him. I



1 allocated the hundred percent of the Blue Sun damages here, the  
2 \$2.1 million to Mr. Lucas. So \$2,071,974 was to Lucas.

3 Q. Okay. What about Mr. Gajewski?

4 A. For Mr. Gajewski, given that he was -- really  
5 introduced the -- the service side of the business for Blue  
6 Star -- Blue Sun, sorry, and, really, that was their business  
7 model was to go in and service customers and then develop  
8 relationships to then sell analyzers and other consumables.  
9 You know, he kind of facilitated that for -- for Ms. Glenister  
10 to come into the market and start selling as the North America  
11 sales director and then also for Mr. Eilert to do service for  
12 various customers.

13 And so given his role and also publishing the application  
14 notes or providing the application notes to Mr. Lucas, I  
15 allocated a hundred percent of the sales of Blue Sun to Mr.  
16 Gajewski as well. So \$2,071,974.

17 Q. Because that profit number for Blue Sun includes both  
18 profits from servicing KPM units, as well as their profits  
19 derived from their 35 percent of the revenue that they get from  
20 the sale of the Phoenix analyzers?

21 A. Correct, any consumables as well.

22 Q. Okay. What about Ms. Glenister?

23 A. For Ms. Glenister, given that now the market had kind  
of  
24 been facilitated by Mr. Gajewski, and she joined Blue Sun  
25 in -- I don't remember the date exactly, but we used her start

1 date, given that she is the North American sales director and  
2 every sale in North America will follow under her purview, we  
3 took every sale of North America from the date she started  
4 forward. And that was about 73 percent of the sales. That  
5 number is about 1.5 million. I think the exact million is  
6 \$1,508,666.

7 Q. Thank you. And this isn't a memory test. Again, we have  
8 your reports like on Friday in front of you. If you feel the  
9 need to take a look at them, feel -- if you have the need to  
10 look at them, feel free to do so.

11 And then Mr. Eilert, what of that 2 million --  
12 2,071,974, if any, did you allocate to liability for  
13 Mr. Eilert?

14 A. For Mr. Eilert, we allocated any dollars that were related  
15 to the servicing that he did on behalf of customers. So just  
16 any -- any transaction where he was the one who was servicing  
17 the analyzer.

18 Q. And what did that number compute out to?

19 A. That was a little less than \$42,000. I'll confirm, but I  
20 believe the number was \$41,734. \$41,728.

21 Q. Okay. Now to be clearer, KPM's not asking for multiple  
22 recoveries here, correct?

23 A. That's correct.

24 Q. And so while you've allocated the 2,071,974, that would be  
25 recoverable against Blue Sun itself, correct?

1 A. That's correct.

2 Q. And then each of the numbers for the individual defendants  
3 are the amount that KPM could pursue against each of those  
4 defendants according to your analysis, correct? Not sum them  
5 all and get 2 million multiple times?

6 A. They're not active sales. The 2,071,974 is the maximum.

7 Q. Okay. Now, you said that all of this under trade secret,  
8 the trade secret counts, was one measure of measuring and  
9 determining damages suffered by KPM of unjust enrichment.

10 What was the other measure?

11 A. It's actual loss by the plaintiff, and that was measured  
12 by lost profits, KPM's lost profits on its lost sales.

13 Q. Okay. And how did you go about doing any analysis of  
14 KPM's actual lost profits?

15 A. So given we had transactional data for both Blue Sun as  
16 well as KPM, we looked at all of the sales made by Blue Sun and  
17 matched up any sales by geographic location and customer name,  
18 where there was a match with KPM, and by doing that process,  
19 I -- we matched up about \$3 million of the \$5.4 million in  
20 total Blue Sun sales.

21 Q. Okay.

22 A. That number is, to be exact, \$3,041,457 in lost KPM sales  
23 through that analysis.

24 Q. Okay. And you did that again, you said, by matching up  
25 transactional data. Just so we're all clear, what's the

1 transactional data?

2 A. Sure. It's the invoice data we had. So we had -- we  
3 looked at it on Friday for Blue Sun, which was the line-by-line  
4 data which was invoice number, date, what was purchased, the  
5 price that was paid, the customer name, the customer location,  
6 address, et cetera.

7 Q. I see. And then if you found parallel information with  
8 KPM, you included that in your count?

9 A. Correct.

10 Q. Okay. And is it, therefore, your opinion that KPM lost  
11 profits of the full \$3 million in revenue?

12 A. No. Obviously to get to profits, you need to deduct the  
13 applicable costs.

14 Q. I see. And what was the method, if any, that you applied  
15 to your analysis to subtract costs from that 3 million plus  
16 revenue number in order to obtain a result?

17 A. So we had data from the specific division, for NIR sales  
18 within KPM, and within that division, for those sales, we took  
19 the cost of goods sold, which would be the cost of actually  
20 manufacture itself of the product, and then we took the selling  
21 the distribution expenses as well in total. Even though it was  
22 likely -- we likely took more costs than necessary, but to be  
23 conservative we included the entire line item.

24 Q. I see. And did that result in a total number of -- total  
25 amount of costs or percentage or what?

1 A. It was --

2 Q. What was the next step in the process?

3 A. It was 30.2 percent profit margin, which we then used  
4 to calculate the profit in dollars.

5 Q. Okay. So if we could put up slide 8.

6 Is this a summary of what you were just describing?

7 A. Yes, that's correct. So you can see the lost sales of  
8 \$3,041,457, multiplied by the KPM profit margin of  
9 30.2 percent, and that results in lost profits of \$918,520.

10 Q. And did you perform a similar allocation process to  
11 each of the individual defendants as you described  
12 previously regarding unjust enrichment?

13 A. I did. Using the same methodology that I discussed of the  
14 unjust enrichment analysis.

15 Q. You didn't apply a percentage on the unjust  
16 enrichment analysis.

17 Were costs already included there or did they  
18 not count in terms of the unjust enrichment analysis?

19 A. So for the data we have for Blue Sun, there was on the  
20 invoice data, the line item data we looked at on Friday, there  
21 was cost information within that schedule, within that  
22 financial data; and then we also had for ITG, we had their  
23 financial statements. So we used their information to quantify  
24 the profits for the ITG portion.

25 Q. So in both cases is it fair to say, both your unjust



1 enrichment analysis and your lost profits analysis, that you're  
2 dealing with the profits of the respective companies  
3 respectively and have already accounted for the full costs  
4 involved in making those sales?

5 A. Based on the information available, yes.

6 Q. And then I was asking you about allocation of lost profits  
7 among the different defendants.

8 Did you do that analysis?

9 A. Yes. As I stated previously, I allocated 100 percent of  
10 the damages to Mr. Lucas and Mr. Gajewski, and I did the same  
11 here in the lost profits analysis. So for each of them I  
12 allocated \$918,520.

13 Q. Okay.

14 A. For Ms. Glenister, again the same analysis, looking at the  
15 date she started and taking all of the sales that were made in  
16 North America from the date she started forward, given she's  
17 the North American sales director. That amount totaled  
18 \$624,456.

19 Q. And then for Mr. Eilert.

20 A. And for Mr. Eilert, I looked at just those instances where  
21 he actually serviced the analyzer for those transactions, and  
22 that number is \$15,353.

23 Q. Okay. And once again, as we saw with the unjust  
24 enrichment way of measuring trade secret damages, the  
25 allocations that you're talking about are not additive,



1 correct?

2 A. Correct, they're not additive.

3 Q. Okay. All right. So that's the questions that I have for  
4 trade secret misappropriation.

5 Let's talk about the additional counts in this case  
6 for various breaches by the defendant -- defendants. Okay?

7 A. Sure.

8 Q. There are three counts and allegations that KPM makes  
9 against the defendants for breaches, a breach of contract, I  
10 guess the individual defendants -- sorry, breach of contract,  
11 breach of good faith and fair dealing, and breach of the duty  
12 of loyalty.

13 What measure of damages do you understand did you use for  
14 your analysis as being available for each of those three types  
15 of breaches by the individual defendants?

16 A. My understanding is, based upon those claims or causes of  
17 action, that the available damages remedy would be the harm to  
18 the plaintiff, so the actual loss. Really trying to put the  
19 plaintiff back in the place it would have been had the  
20 wrongdoing not happened.

21 Q. And that's true for breach of contract?

22 A. Correct.

23 Q. And for breach of covenant of good faith and fair dealing?

24 A. Correct.

25 Q. And for the -- the breach of their duty of loyalty to KPM?

1 A. Correct.

2 Q. So all three of those are measured by the harms suffered  
3 by KPM. Can we make use of your previous harm calculations  
4 under the trade secret counts for these three counts?

5 A. Yes, my lost profits analysis would apply here.

6 Q. Okay.

7 MR. GUTKOSKI: And if we could put up slide 9.

8 BY MR. GUTKOSKI:

9 Q. We see the same numbers we just saw on slide 8, correct?

10 A. That's correct.

11 Q. Because the total harm of loss suffered by KPM is the  
12 total loss suffered by KPM whether we look at it under trade  
13 secrets or the breaches?

14 A. Correct. This would put the plaintiff back in the place  
15 it would have been.

16 Q. And did you allocate this amount amongst the four  
17 individual defendants that would potentially be liable for  
18 breaching the contract, the duty of good faith and fair dealing  
19 and the duty of loyalty?

20 A. I did. I'm just glad you didn't ask me to remember the  
21 names of the tort claims.

22 Q. They're harder than remembering the numbers, I'm sure.

23 So what if the jury were to award unjust enrichment as the  
24 measure of trade secret damages, but lost profits under the  
25 breaches of contract fair dealing and loyalty, how would

1 that -- how would that math work out?

2 A. Sure. I think we may have chatted about this on Friday,  
3 but the same -- the same would apply where it would be only a  
4 maximum of the unjust enrichment of the 3.2 million. That  
5 would be the maximum damages. They're not additive. So you  
6 wouldn't take both of them.

7 Q. If the jury were to decide between the 3.2 million and the  
8 918,000 options under trade secrets, the 3.2 would predominate  
9 over the breaches counts?

10 A. Correct. Or even if both were found, you know, liable  
11 under both counts, it would just -- not to say this would be  
12 thrown to the side, but it just wouldn't be counted for as  
13 damages, because the 3.2 million of the unjust enrichment  
14 related to the misappropriation of trade secrets would be --  
15 would take precedence.

16 Q. And KPM isn't permitted and is not acting -- not asking to  
17 double count here?

18 A. No.

19 Q. Okay. Let's talk about Count Seven, which is tortious  
20 interference with contractual relations. You thought the last  
21 ones were hard to say.

22 What's your understanding of interference with contractual  
23 relations? First of all, which -- which defendants is KPM  
24 making those allegations against?

25 A. Against the individual defendants.

1 Q. For the tortious interference against the companies or  
2 the --

3 A. Oh, sorry, against the companies.

4 Q. So the entity defendants?

5 A. Yes, correct.

6 Q. Okay. And what is the measure of damages, as you  
7 understand it, available for Blue Sun and ITG's interference  
8 with the contracts of the individual defendants?

9 A. It would be similar to what I discussed related to  
trade  
10 secret misappropriation. So a laundry list of items related to  
11 unjust enrichment as well as the -- the actual loss to the  
12 plaintiff, so increased costs, lost profits, harm to goodwill,  
13 et cetera.

14 Q. And so again, we have two potential measures of damages,  
15 the unjust enrichment or the lost profits?

16 A. Yes.

17 Q. Okay. In terms of tortious interference, are there any  
18 additional amounts that you calculated for tortious  
19 interference unjust enrichment different from trade secret  
20 misappropriation unjust enrichment?

21 A. So the only difference is in this instance, there were  
22 some additional costs that KPM incurred related to replacing  
23 and finding replacements for the departed employees. So this  
24 related to recruiting expenses. It could be, you know, hiring  
25 firms. It could be posting job postings, and monitoring those

1 job postings. It could be -- there was a various lists of  
2 expenses that were incurred to the total of approximately  
3 \$211,000.

4 Q. Okay. So if we could take a look at slide 10.

5 So you take the same total and include those increased  
6 costs?

7 A. Correct.

8 Q. So the total amount of damages available against the  
9 entity defendants for tortious interference is what amount?

10 A. It's \$3,426,792.

11 Q. Okay. And I think you said lost profits, and that  
12 approach was also available for tortious interference?

13 A. Yes, correct.

14 Q. Okay. If we look at your next slide, did you apply that  
15 amount and include those additional increased costs that you  
16 mentioned?

17 A. Yes, you can see on the top line is my analysis we spoke  
18 about for lost profits of \$918,520. On the second line is the  
19 increased costs, totaling \$211,691. And that gives a total of  
20 \$1,130,211.

21 Q. So in terms of tortious interference, both the 3.426792  
22 or 3,426,792 number and the 1,130,211 number are available to  
23 the jury to measure the KPM damages under that count?

24 A. Correct.

25 MR. GUTKOSKI: May we approach?



1 THE COURT: Yes.

2 (Sidebar as follows:)

3 MR. GUTKOSKI: Mr. Zoltowski has done a calculation for  
4 what the damages would be under 93A, just straight up, no  
5 doubling or trebling, but I don't know if your Honor is going  
6 to give instructions to the jury and ask for an advisory  
7 opinion on that; and therefore, I do not want to get into 93A  
8 if you weren't going to be including that in your instructions.

9 THE COURT: I have it preliminarily included in the  
10 instructions.

11 MR. GUTKOSKI: Okay. Then I'll --

12 MR. RITCHIE: We believe that is a calculation for the  
13 Court, your Honor, not the jury, which is why Mr. Gutkoski was  
14 asking for guidance from the Court in the first place.

15 THE COURT: All right. So how do you respond to the  
16 calculation being within the purview of the Court versus the  
17 jury?

18 MR. GUTKOSKI: I think the law is unsettled as to  
19 whether it is a jury question or a court question.

20 THE COURT: I can only tell you that in the state  
21 court when I have tried 93A actions, it is bifurcated prior  
22 to the start of the trial.

23 MR. GUTKOSKI: And it wasn't bifurcated here, nor was  
24 there a motion to do so. In a case that we cited to you  
25 multiple times that was tried earlier this year in this